No. 92-212

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BARCLAYS BANK PLC
Petitioner,

v.

FRANCHISE TAX BOARD,
An Agency of the State of California
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR NESTLÉ HOLDING, INC. AND GENSTAR COMPANY AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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18,416 (1978) 19

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INTEREST OF AMICI CURIAE

The amici curiae are corporations incorporated, commercially domiciled and doing business in the United States. Each is owned entirely by a corporation incorporated in a foreign country. Each is presently engaged in a franchise tax controversy with the California Franchise Tax Board regarding, *inter alia*, the ability of the Franchise Tax Board to include the United States operations of the amici curiae and their United States subsidiaries in a single unitary business with their foreign parent corporations and the other foreign affiliates of those foreign parent corporations. The foreign opera-

tions that are the subject of these controversies are entirely conducted by corporations incorporated, commercially domiciled and doing business in foreign countries. The amici therefore have a strong interest in the constitutional principles governing methods of state taxation that adversely affect governmental relations between the United States federal government and foreign governments. The California Supreme Court's decision would substantially alter those principles by treating congressional silence as consent to the Franchise Tax Board's worldwide unitary method of taxation. Such an alteration would significantly affect both the tax liabilities of the amici and the environment in which they conduct their business. Specifically, allowing the California Supreme Court's decision to stand would affect the relationship between the government of the United States and the governments of the countries (Switzerland and Canada) in which the parent corporations of the amici are based.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

I. When Congress exercises its power under the Commerce Clause to consent to a state law, any question of the validity of that state law under the dormant Commerce Clause disappears, even though that state law might otherwise burden interstate or foreign commerce. Recognizing the considerable consequences that emanate from a finding of congressional consent, this Court has consistently required that Congress manifest its consent to state law through clear unambiguous affirmative action. *See, e.g., Wyoming v. Oklahoma,* 112 S. Ct. 789, 802 (1992); *Maine v. Taylor,* 477 U.S. 131, 138-9 (1986); *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984); *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 960 (1982); *New England Power Co. v. New Hampshire,* 455 U.S. 331, 343 (1982).

Despite this well-established body of case law, the California Supreme Court found congressional consent to California's use of the worldwide combined reporting method

of taxation not in unambiguous affirmative action, but rather in "the din of a 'governmental silence'." Pet. App. A-26. The California Supreme Court justified its novel approach by relying almost exclusively on this Court's decision in *Wardair Canada Inc. v. Department of Revenue*, 477 U.S. 1 (1986), finding that case to represent "if not a change of course in the high court's dormant commerce clause jurisprudence, at least a retrenchment in its scope." Pet. App. A-24. However, the California Supreme Court's conclusion that congressional silence and inaction can form the basis of congressional consent cannot be reconciled with *Wardair* or decisions of this Court prior to and following *Wardair*. Indeed, *Wardair* itself found consent on the basis that "the Federal Government has not remained silent" but rather "has affirmatively decided to permit" the state taxation at issue. *Wardair*, 477 U.S. at 12.

The California court's attack on this Court's criteria for determining congressional consent warrants review. First, important policies of free trade protection surround this Court's insistence on clear expressions of congressional consent, and these policies will be jeopardized if review is not granted. Moreover, if the standard for determining congressional consent is to be so dramatically curtailed, it is the prerogative of this Court, not the California Supreme Court, to so rule. Second, the California Supreme Court's misreading of *Wardair* demands correction. *Wardair* does not represent a retrenchment in the scope of this Court's dormant Commerce Clause jurisprudence, but rather is fully consistent with this Court's earlier, as well as later, decisions. It is incumbent upon this Court to clarify any confusion surrounding the standards for congressional consent in order to prevent further misreading by other courts. Finally, and perhaps most importantly, if congressional silence alone can justify congressional consent, the scope of protection from burdensome state laws offered by the dormant Commerce Clause will be severely restricted, perhaps to the extent that such protection will become nonexistent. The implications of the decision below are therefore destructive of the free trade purpose underlying the Commerce Clause and must not be left undisturbed by this Court.

II. The inaction of Congress in this case is inconsistent with any plausible view of consent and certainly does not establish the factual basis for consent found in *Wardair*. Whereas the Court in *Wardair* found consent in a series of international agreements that specifically considered the state taxation at issue, the California Supreme Court found consent by implication in a series of congressional inactions and failures to act. Four of the five items of inaction relied on by the California Supreme Court to find congressional consent do not even mention the question of states' use of worldwide combined reporting, expressing no more than a preference for separate accounting at the federal level. The single item relied on by the California Supreme Court which addresses the taxing method at issue is the failure to obtain the necessary two-thirds votes to ratify a treaty containing a provision prohibiting states' use of worldwide combined reporting. However, a majority of senators voted to support the provision, negating any possible inference of consent from the failure to act.

Finally, the five factors found by the California Supreme Court to constitute congressional consent all existed prior to this Court's decision in *Container Corporation of America v. Franchise Tax Board*, 458 U.S. 159 (1983). Nevertheless, despite the presence of these factors at that time, this Court engaged in dormant Commerce Clause analysis and therefore did not find that Congress had consented to worldwide combined reporting.

REASONS FOR GRANTING THE PETITION

This case presents issues of considerable importance to the foreign relations of the United States and to the Court's Foreign Commerce Clause jurisprudence. As detailed in Barclays' petition, and in the supporting briefs filed by other amici, California's worldwide combined reporting requirements, particularly as applied to multinational corporate affiliates with foreign parents, have been the focus of enormous international controversy. Moreover, the decision below sustaining California's taxing scheme disregards "sensitive matters of foreign relations and national sovereignty" recognized by the Court in *Japan Line, Ltd. v. County of Los Angeles*, 441

U.S. 434, 456 (1979). These considerations alone justify the grant of Barclays' petition.

There is, however, another compelling reason for reviewing the decision below: The California Supreme Court invented an unwarranted approach to ascertaining whether Congress has consented to state law under the Commerce Clause, and thereby precluded an inquiry into the validity of the law under the dormant Commerce Clause. By discovering congressional consent in the "din of a 'governmental silence'" (Pet. App. A-26), the court below has made a mockery of the very concept of consent. Moreover, the court's analysis cannot be reconciled with this Court's precedents that consistently refuse to infer congressional approval of state action from congressional inaction. In urging the Court to grant Barclays' petition, amici Nestlé Holdings, Inc., et al. focus their attention on the critical question of Commerce Clause jurisprudence raised by the California Supreme Court's disposition of the congressional consent issue.

I. THE CALIFORNIA SUPREME COURT'S VIEW THAT CONGRESS' SILENCE CONSTITUTES CONSENT UNDER THE COMMERCE CLAUSE IS INCOMPATIBLE WITH THIS COURT'S PRECEDENTS AND THE FREE TRADE PURPOSES UNDERLYING THE COMMERCE CLAUSE

A. In Recognizing Congress' Power to Consent to State Laws That Would Otherwise Be Unconstitutional Under the Dormant Commerce Clause, This Court Has Equated Consent With Affirmative Congressional Action

The appropriate standard for determining when Congress has consented to state law under the Commerce Clause is rooted in the underlying principle that accords congressional consent its crucial constitutional function in this domain. The principle was first articulated a century ago in *In re Rahrer*, 140 U.S. 545 (1891), and given its definitive modern exposition in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

In *Prudential*, the Court considered a challenge under the negative implications of the Commerce Clause to a South Carolina tax on insurance companies that allegedly discriminated against interstate commerce. Congress had provided in the McCarran Act, however, that "taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the... taxation of such business...." 15 U.S.C. § 1011. In addressing the question whether its dormant Commerce Clause cases had any bearing on the taxpayer's claim, the Court first observed that "[t]hose cases... presented no question of the validity of such a tax where Congress had taken *affirmative action* consenting to it...." 328 U.S. at 421 (emphasis supplied).

Because the taxpayer argued that the Commerce Clause, by its own force, nevertheless limited "Congress' permissible *action* in this respect" (*id.* at 422 (emphasis supplied)), the Court proceeded to address the merits of the question. The Court put the question this way: "[I]f the commerce clause, 'by its own force' forbids discriminatory state taxation, or other measures, how is it that Congress *by expressly consenting* can give that action validity?" *Id.* at 426 (emphasis supplied). The answer was easy. When Congress has *acted* under its commerce power, whether to preempt or consent to state laws, any question of the validity of the state law under the dormant Commerce Clause simply disappears. Indeed, "whenever Congress' judgment has been *uttered affirmatively* to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' *expressed approval*." *Id.* at 425 (emphasis supplied). Since Congress had *"expressly stated* its intent and policy" (*id.* at 427 (emphasis supplied)) regarding the states' freedom to tax the insurance industry in the McCarran Act, the Court was "not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power." *Id.*

The requirement that Congress' consent to state laws under the Commerce Clause be reflected in Congress' affirmative action is necessitated by the profound consequences of finding such consent. As the Court noted in *Prudential*, because Congress has plenary power over the channels of interstate commerce, "Congress may keep the way open, confine it broadly or closely, or close it entirely" (*id.* at 434), subject only to the limitations that the Constitution imposes on Congress' own power. This includes, of course, the power to authorize state laws that discriminate against or otherwise burden interstate commerce, laws that would be struck down in the absence of congressional action consenting to them. *Id.* By clearly indicating that congressional consent was a function of affirmative action by Congress, the Court in *Prudential* protected the values underlying the dormant Commerce Clause from erosion through findings of implied congressional consent while recognizing Congress' plenary power to expand or contract state tax power without regard to the restraints imposed by the dormant Commerce Clause.

B. This Court's Precedents Uniformly Require That Congress Manifest Its Consent to State Laws Under the Commerce Clause by Unambiguous Affirmative Action

Because Congress' consent to state laws under the Commerce Clause completely removes them from judicial scrutiny under the negative Commerce Clause, the Court, faithful to the teachings of *Prudential*, has properly insisted that Congress manifest its consent to state law through unambiguous affirmative action. Thus the Court has repeatedly stressed that "an unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation" and provide an "exemption from Commerce Clause scrutiny." *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986); *see also Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or approve... a violation of the Commerce Clause"); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82,

91-92 (1984) (rejecting "'implicit approval' theory" of congressional consent and reaffirming "a rule requiring a clear expression of approval by Congress"); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) ("[i]n the instances in which we have found such [congressional] consent, Congress' '"intent and policy" to sustain state legislation from attack under the Commerce Clause' was '"expressly stated"'"); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) ("when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause,... we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind'").

Without such a rule of unambiguous congressional action as a predicate to finding that Congress has consented to state law under the Commerce Clause, the fundamental values that the Commerce Clause was designed to protect would be jeopardized. The Court has recognized that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). The Court has protected the core value of free trade within a national market in its numerous decisions under the dormant Commerce Clause striking down state laws that burden interstate commerce. To be sure, Congress is free to remove the protective shield of these decisions when it sees fit to do so. But to expose interstate or foreign commerce to burdensome state legislation without the clearest signal from Congress of its intent to strip such commerce of the protections it ordinarily enjoys would undermine our constitutional scheme. "Absent a 'clear expression of approval by Congress,' any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.'" *Maine v. Taylor*, 477 U.S. at 139.

C. The California Supreme Court's Novel Approach to Ascertaining Congressional Consent to State Laws Under the Commerce Clause Cannot Be Reconciled With This Court's Decisions and Raises an Issue of Broad National Significance Warranting Review by This Court

Despite the large and settled body of case law bearing on congressional consent to state law under the Commerce Clause, the decision below virtually ignored it in holding that congressional consent could be found in "a species of governmental *silence* that forecloses resort to a dormant foreign commerce clause analysis." Pet. App. A-21 (emphasis in original). As a result, the court relied on a series of congressional inactions in finding that Congress had consented to California's requirement of worldwide combined reporting. *See* pp. 14–15, *infra*. Even if these congressional inactions were relevant to the question of consent under the Commerce Clause, we demonstrate below that they could not conceivably support the inference that Congress has, in fact, consented to California's taxing scheme. *See* pp. 15–20, *infra*. First, however, we consider the more fundamental error of the opinion below, namely, that congressional silence can lay the foundation for a finding of Congress' consent to state law under the Commerce Clause.

The California court's view that "the din of a 'governmental silence'" (Pet. App. A-26) provides a legitimate basis for discerning congressional consent to state law, thereby obviating an inquiry into the law's validity under the dormant Commerce Clause, rests entirely on its reading of *Wardair Canada Inc. v. Department of Revenue*, 477 U.S. 1 (1986). *Wardair* involved the imposition of a Florida sales tax on aviation fuel purchased in Florida by a foreign air carrier for use in international flights. The carrier challenged the tax on two theories: first, it was preempted by federal legislation; second, it was barred by the dormant Commerce Clause.

The Court rejected the preemption argument on the ground that Congress had expressly permitted the states to impose "sales or use taxes on the sale of goods or services"

(Federal Aviation Act of 1958, § 1113(b), 15 U.S.C. § 1513), which included airline fuel. 477 U.S. at 6-7. Such an affirmative statement by Congress might itself have been deemed sufficient to constitute consent to the state law, thereby precluding any further inquiry into the matter under the negative implications of the Commerce Clause. The Court nevertheless felt compelled to go further in responding to the taxpayer's dormant Commerce Clause argument because it felt Congress may not have expressly considered the imposition of such taxes on *foreign* air carriers in enacting section 1113 of the Federal Aviation Act, even though that section did not by its terms distinguish between foreign and domestic carriers. 477 U.S. at 7. Thus, consistent with its precedents addressing congressional consent to state law (*see* pp. 7–8, *supra*), the Court adopted an extremely high standard for finding express approval of a state tax, requiring a clear indication that Congress had intentionally taken legislative action manifesting consent to the tax.

The Court did not need to look far beyond the Federal Aviation Act, however, in order to find that Congress through unambiguous affirmative action had given its approval to the state tax in question. Thus the Court relied on a series of international agreements which "demonstrate that the Federal Government has *affirmatively acted*, rather than remained silent, with respect to the power of the States to tax aviation fuel." *Id.* at 9 (emphasis supplied). The "*actions* taken by the Federal Government [which] accept the authority of the States to tax as Florida has here" (*id.*) (emphasis supplied) included the Chicago Convention on International Aviation, which specifically addressed the question of state and local taxation of aviation fuel, and more than 70 bilateral agreements that "acquiesced in state taxation of fuel used by foreign carriers in international travel." *Id.* at 12.

What all this made "abundantly clear" (*id.*) to the Court was that "the Federal government *has not remained silent* with regard to the question whether the States should have the power to impose taxes on aviation fuel used by foreign carriers in international travel." *Id.* (emphasis supplied). Because the

"Federal Government *has affirmatively decided* to permit the States to impose these sales taxes on aviation fuel" (*id.*) (emphasis supplied), and because "it would turn dormant Commerce Clause analysis upside down to apply it where the *Federal Government has acted*" (*id.*) (emphasis supplied), the Court concluded that Congress had consented to the Florida tax and there was no need to consider its validity under the dormant Commerce Clause.

Despite the Court's unequivocal holding in *Wardair*, which reflects the lessons of its earlier decisions, that affirmative congressional action is the touchstone of congressional consent to state law under the Commerce Clause, the court below nevertheless found that Congress had consented to California's worldwide combined reporting scheme on the basis of congressional silence and inaction. *See* pp. 14–20, *infra*. The court justified its departure from this Court's precedents on the ground that *Wardair* itself "represents, if not a change of course in the high court's dormant commerce clause jurisprudence, at least a retrenchment in its scope." Pet. App. A-24. According to the court below, *Wardair* "can be abstracted into a kind of protocol for identifying those kinds of governmental silences that give rise to 'negative implications' supporting an inference of federal acquiescence in the state tax under challenge." Pet. App. A-23. And it read *Wardair* as "establish[ing] an interpretive framework for educing from a compilation of legislative materials a species of governmental *silence* that forecloses resort to dormant commerce clause analysis." Pet. App. A-21 (emphasis in original).

The California Supreme Court's frontal assault on this Court's criteria for determining when Congress has consented to state law under the Commerce Clause plainly warrants the Court's plenary review. In the first place, there is no justification either in constitutional policy or in this Court's precedents for the extraordinary suggestion of the court below that Congress' silence constitutes consent under the Commerce Clause. As we have explained above, both the policy and law are to the contrary, and the California court has advanced no sound reason for abandoning it. In any event, it is clearly the

prerogative of this Court — not a state court — to determine whether its decisions should be overturned. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Second, even if there are some suggestions in *Wardair* that the "negative implications" (477 U.S. at 10, 12) of affirmative congressional action can lay the evidentiary predicate for a finding of congressional consent to state law, these suggestions do not license a state court to base a finding of consent on the negative implications of congressional *inaction*, which is what the California court did here. *See* pp. 13–20, *infra*. The Court in *Wardair* explicitly declared that it was drawing negative inferences from governmental action — not governmental omission — in finding that Congress had affirmatively consented to the tax at issue.

Third, the suggestion that *Wardair* "represents, if not a change of course in the high court's dormant commerce clause jurisprudence, at least a retrenchment in its scope" (Pet. App. A-24) is unfounded. *Wardair* is woven from the same cloth as the Court's earlier decisions involving congressional consent (*see* pp. 7–8, *supra*), as well as from its later decisions. *Id.* Indeed, the claim that there has been a "retrenchment" in the Court's foreign Commerce Clause jurisprudence is belied by the Court's most recent decision in this domain. *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 112 S. Ct. 2365 (1992). In any event, insofar as one might read *Wardair* as relaxing the standards for finding congressional consent to state law, *Wardair*, 477 U.S. at 18-20 (Blackmun, J., dissenting), it is incumbent upon this Court to clarify those standards so they will not be subject to the misreading that they received below.

Finally, the implications of the decision below are so destructive of the free trade purposes underlying the Commerce Clause, which provides the basis for this Court's dormant Commerce Clause jurisprudence, that it should not be left undisturbed. Under the California court's analysis, "silence" becomes a basis for inferring consent to state law under the Commerce Clause. Yet it is this very "silence" that

has for two centuries been the basis for the Court's dormant Commerce Clause jurisprudence. If congressional silence can justify a finding of congressional consent to state laws, then there may well be no room for the dormant Commerce Clause to operate at all. At a minimum, its scope may be substantially narrowed, and courts will have to distinguish between the kinds of "silence" that warrant a dormant Commerce Clause inquiry and those that preclude judicial scrutiny of the state law altogether. These questions are indisputably worthy of this Court's attention.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH *WARDAIR* AND RENDERS THE CONCEPT OF CONGRESSIONAL CONSENT MEANINGLESS

The inaction of Congress in this case is inconsistent with any plausible view of consent and certainly does not establish the factual basis for consent found in *Wardair*. If left undisturbed, the California's court's opinion would leave the law in this area in shambles.

As noted above, in *Wardair*, this Court found it unnecessary to engage in dormant Commerce Clause analysis because it was "abundantly clear" that the federal government had *acted* rather than remained silent. *Wardair*, 477 U.S. at 12. The Court found this affirmative action in three documents: (1) the Chicago Convention on International Civil Aviation entered into by the United States on December 7, 1944; (2) a Resolution adopted November 14, 1966, by the International Civil Aviation Organization, of which the United States is a member; and (3) bilateral agreements into which the United States had entered with various foreign countries.

The Chicago Convention specifically considered subnational taxation of aviation fuels and prohibited local taxes on fuel only when the fuel was "on board an aircraft... on arrival... and retained on board on leaving." Consistent with well-settled principles of statutory construction, *see Sutherland Stat. Const.* § 47.23 (5th ed.), this Court found that, by directly addressing the question of state taxation of aviation fuel and specifying which taxes could not be imposed, the federal gov-

ernment was thereby consenting to the imposition of other state taxes, including the state tax at issue in that case. *Id.* at 10.

With respect to the 1966 Resolution, on the other hand, even though it endorsed an international scheme to exempt fuel "from all customs and other duties," the Court found that this did not negate the congressional policy reflected in the 1944 Chicago Convention. The Resolution was found not to be action by the government of the United States but merely the work product of an organization to which the United States belonged.

The Convention established the context within which the Court considered the subsequent bilateral aviation agreements with foreign countries. In light of the Convention and the Resolution, both of which specifically addressed the concern of subnational taxation, the Court found that the express language of the agreements precluding only national taxes on aviation fuel reflected a conscious decision by the federal government to allow the state taxes at issue in the case. The Court therefore concluded that "the Federal Government has affirmatively decided to permit the states to impose these taxes on aviation fuel" (477 U.S. at 12) and dormant Commerce Clause analysis was inappropriate.

The affirmative action found to establish consent in *Wardair* stands in stark contrast to the five items of inaction relied on by the California Supreme Court to support the proposition that Congress has consented to states' use of worldwide combined reporting. These five items of inaction include the following:

1. Failure to consider state taxes in any income tax treaties with foreign nations, except in nondiscrimination clauses;

2. The absence of any provision restricting state taxes of any sort in various model income tax treaties;

3. The absence of restrictions on state taxation in Friendship, Commerce & Navigation ("FCN") treaties to which the United States is a party;

4. The absence of enacted congressional legislation prohibiting or restricting the worldwide unitary method; and

5. Failure to obtain the necessary two-thirds vote to ratify a treaty containing a provision prohibiting use of the worldwide unitary method by the states.

The first three factors relied on by the California Supreme Court neither directly address nor, indeed, even consider the question of worldwide combined reporting at the subnational level. The treaties, while requiring use of separate accounting at the national level, are *silent* on the issue of separate accounting at the state level. Yet the California Supreme Court found that "an extensive pattern of executive branch-negotiated diplomatic texts parallels, in our view, Congress' own unwillingness to disallow legislatively the states' application of formula apportionment methods to foreign controlled multinational taxpayers, and bespeaks a coordinate 'acquiescence.'" (Pet. App. A-34.)

Such a suggestion is absurd. If congressional consent is to retain any meaning, it cannot be held that an expression of a federal preference for separate accounting stands for the proposition that Congress thereby consents to states' use of worldwide combined reporting. Indeed, if such an analysis is allowed to stand unchallenged, any treaty that regulated federal taxation at the national level, or failed to consider a particular state taxation method, would reflect a conscious congressional decision to allow states to tax in any manner they please. Such a result would render dormant Commerce Clause analysis obsolete. If the Senate ratified a treaty which included a provision specifically prohibiting or permitting a state taxation method, clearly dormant Commerce Clause analysis would be irrelevant; similarly, however, under the California Supreme Court's approach, if that same treaty were silent on the issue of state taxation, that silence would reflect affirmative approval of and consent to any particular taxing method used by the states, thereby also rendering dormant Commerce Clause analysis irrelevant.

The California Supreme Court's finding that these treaties "parallel the *Wardair* paradigm" (Pet. App. A-34) is also inapt. The treaties at issue in this case are vastly different from the bilateral agreements at issue in *Wardair*. In *Wardair*, the specific subject matter encompassing the tax at issue had been addressed in both the Chicago Convention and the Resolution. The subsequent bilateral agreements were therefore entered into in the context of these foundational documents and the absence of reference to state taxation reflected a congressional policy to leave unchanged the state tax boundaries established by those earlier documents. In contrast, the treaties and other bilateral agreements at issue in this case did not emanate from any congressional understanding or accord on the subject of state taxation of the income of multinational corporations. Rather these treaties were negotiated and entered into in the context of congressional silence on the subject of state taxation of multinationals and therefore no congressional intent can be attributed to the absence of state taxation regulation.

The California Supreme Court asserted that the fact that the tax treaties contained nondiscrimination clauses applicable to the states demonstrates that state taxation was in fact at issue in these treaties. Again, however, it is hard to see how a general provision precluding states from taxing foreign corporations at a higher rate than domestic corporations implicates the question of states' use of worldwide combined reporting in such a way that an absence of consideration of that issue in these treaties can in fact be seen to be significant and reflective of congressional policy. Moreover, this general reference to state taxation stands in stark contrast to the specific congressional consideration of the particular subnational tax at issue in the Chicago Convention. Surely, if congressional consent is to have any substantive meaning, then a general nondiscrimination provision cannot give rise to a *Wardair* "negative implication."

The negative implications of these treaties are, therefore, quite different from the negative implications of the bilateral agreements in *Wardair*. Indeed, what this Court found in *Wardair* was that there "was not the federal governmental si-

lence of the sort that triggers dormant Commerce Clause analysis" because "the Federal Government *has affirmatively acted, rather than remained silent.*" 477 U.S. at 9 (emphasis supplied).

This distinction is significant when considering the fourth factor found to be significant by the California Supreme Court — the absence of enacted congressional legislation prohibiting or restricting the use of worldwide combined reporting to foreign-based multinationals. Failure to enact legislation is clearly not "affirmative action" of the type that can be considered in any *Wardair*-type analysis.

The only factor that specifically addresses the application of worldwide combined reporting to foreign-based enterprises is the last. However, this factor provides no more insight into congressional policy than the prior four. In 1975, the Executive Branch negotiated an income tax treaty[1] with the United Kingdom that contained a provision, article 9(4), that would have prohibited the states' application of worldwide combined reporting to U.K.-based groups. Senator Frank Church introduced a "reservation" to 9(4) in the Senate Foreign Relations Committee which would have effectively removed 9(4) from the treaty. This Church reservation was *defeated* 10 to 5 in the Senate Foreign Relations Committee. The reservation was then voted upon on the Senate floor, and, again, *defeated* 44 to 34. The treaty with article 9(4) included received a favorable vote of 49 to 32, falling only 5 votes short of

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[1] Convention for the Avoidance of Double Taxation, Dec. 31, 1975, U.S.-U.K., 31 U.S.T. 5668, TIAS 9682 (entered into force Apr. 25, 1980).

the required two-thirds vote necessary for the ratification of a treaty. Finally, 9(4) was reserved without a vote and the treaty was ratified with the reservation.[2]

It is from these three majority votes in favor of *prohibiting* states' use of worldwide combined reporting that the California Supreme Court found a congressional policy *permitting* states' use of worldwide combined reporting. Ignoring the majority votes in favor of 9(4), the California Supreme Court focused its attention on the failure to achieve the two-thirds majority necessary to ratify the treaty with article 9(4) included. As always it is dangerous to speculate on the meaning of congressional inaction, but it appears from the congressional record that the merits of worldwide combined reporting were not the primary focus of the debate surrounding article 9(4). Rather the failure to ratify the treaty with article 9(4) included seems to reflect more the concern of the Senate that the treaty ratification process was not the appropriate forum to consider such a curb on states' powers. The more appropriate forum was Congress. One senator expressed it as follows:

> Now that the State authority has been confirmed by judicial opinion, this treaty seeks to curb that power by treaty negotiation — not by constitutional amendment and not by act of Congress.
>
> I cannot support such unwarranted extension of the Executive's power, and must vote for the Church reservation on article 9(4).

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[2] One Senator suggests that it was a mere quirk of congressional procedure that article 9(4) was not included in the treaty: "Last Friday, we rejected the Church reservation by a comfortable majority, only to find it reappear in today's version of the vote. Thus we combined two issues, one which requires only a majority vote, namely the Church reservation, and ratification of the treaty and its protocols which require a two-thirds vote. I would have very much preferred to follow the original suggestion of the Senator from West Virginia, made last Friday, to have two votes back to back, thereby keeping votes and issues apart. I am convinced that in this case we would have had a treaty today including article 9(4)." Remarks of Senator Morgan, 124 Cong. Rec. 19,078 (1978).

Remarks of Senator Matsunaga, 124 Cong. Rec. 18,669 (1978). Similarly, Senator Church, who introduced the reservation, expressed his concern thus:

> There are two important principles at stake in this treaty. The first concerns the role of tax treaties in our constitutional system. Whatever tax treaties are good for, they should not be used to usurp for the executive branch of Government the power to impose major changes in internal tax policy. Yet the United Kingdom Treaty does precisely this.
>
> . . .
>
> The second important principle concerns the proper way for resolving disputes within our federal system....
>
> Mr. President, Congress is the forum in which disputes within the federal system are meant to be resolved.

Remarks of Senator Church, 124 Cong. Rec. 18,416-17 (1978). Ironically, the senatorial failure to ratify the treaty is the "action" that California Supreme Court points to as most clearly showing *congressional* consent for states' use of world-wide combined reporting. Yet in the view of the senators at least, if not the California Supreme Court, *Congress* had not even considered, let alone approved of, worldwide combined reporting.

It is not surprising, therefore, that the California Supreme Court, when reviewing the five factors considered above, heard "the din of a 'governmental silence'." (Pet. App. A-26).[3] What is surprising is that the lower court found that it was a din "that cannot be ignored" (Pet. App. A-26). Certainly, this Court has found that the five "inactions" could, and should, be ignored. Each of the five items alleged here as indications of congressional consent to use of the worldwide unitary method of taxation existed prior to the United States Supreme Court's decision in *Container Corporation of America v. Franchise Tax*

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[3] "Din" is defined in *Webster's Third New International Dictionary* (1976) as "a loud noise; *esp.* a welter of confused or discordant sounds." *Id.* at 635.

Board, 463 U.S. 159 (1983). The *Container* decision refers to the income tax treaties in general, the model treaties, the failure of Congress to take action and the reservation with respect to the U.K. treaty. The FCN treaties were discussed in the Franchise Tax Board's brief in *Container*, but were not mentioned in the *Container* opinion. (*Container Corporation of America v. Franchise Tax Board, supra*, Appellee's brief at 126-29.) Yet this Court did not find that Congress had consented to the worldwide unitary method of taxation but rather that dormant Commerce Clause analysis was appropriate. Nothing has changed.

CONCLUSION

The instances of congressional inaction at issue in this case, whether taken collectively or individually, are inconsistent with any plausible view of consent. If the California Supreme Court's decision is allowed to stand the concept of congressional consent will become meaningless and the scope of the dormant Commerce Clause severely restricted. We therefore urge this Court to grant the Petition for Writ of Certiorari in this case and to give plenary consideration to this matter.

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Respectfully submitted,

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